

Bureau, while it supports the addition of a financial qualifications issue, argues that the inclusion of Gardner's letter in the application negates the element of intent required for the specification of a false certification issue. As shown above, under established principles the element of intent is present.

Non-liquid assets may be treated as liquid only if the applicant: (a) has the assets professionally appraised; (b) discounts the market value by one-third to account for potential market valuations; (c) current liabilities pertaining to the assets are subtracted; and, (d) the resulting amount is enough to match the commitment. Rose Broadcasting Company, 68 F.C.C.2d 1242, 1246, 43 R.R.2d 1317 (1978); Opal Chadwell, 4 FCC Rcd 1215, 65 R.R.2d 1498 (1989); Christian Children's Network, Inc., 101 F.C.C.2d 612, 614 (1985); Texas Communications Limited Partnership, 5 FCC Rcd 4562, 5878, 68 R.R.2d 656 (Rev. Bd. 1990); Port Huron Family Radio, Inc., 5 FCC Rcd 4562, 4563, n. 5, 68 R.R.2d 28 (1990); Dodge-Point Broadcasting Co., 11 F.C.C.2d 751, 754, 12 R.R.2d 457 (1968). The Mass Media Bureau agrees that appraisals of non-liquid assets are required. MMB Comments, p. 18.

37. It is undisputed that Gardner did not subject his non-liquid assets to the required analysis. Accordingly, neither Glendale nor the Commission have any assurance that the values ascribed to the assets by Mr. Gardner are grounded in objective fact. Without objective evidence of the value of non-liquid assets an applicant's promise to fund a loan agreement is simply an empty promise, and a promise from an individual with no incentive to be accurate. Central Florida Communications Group, Inc., supra.

38. Moreover, Glendale had a simple means of ending any controversy concerning the liquidity of its assets by submitting appraisals or the other objective evidence on which Mr. Gardner relied in certifying his financial qualifications. Glendale chose

not to do so, and must bear the risk of its refusal to be forthcoming.

VI. The Evidence Warrants Addition of the Rehabilitation and Compliance Issues

A. The Evidence of Further Violations Mandates Addition Of The Issues

39. In RKO General, Inc. (WAXY-FM), supra, the Commission made clear that evidence of further violations by Gardner would require formal consideration of his rehabilitation and compliance before he received further grants. The Commission explicitly held that such further scrutiny is mandated unless Gardner establishes that there has been "no occurrence of misconduct in connection with the new application." 5 FCC Rcd at 644. Moreover, the Commission stressed that adverse information presented by other parties, such as that set forth in TBF's Contingent Motion, would be considered as an integral part of the evaluation of Gardner's rehabilitation and compliance. Id.

40. Both Glendale and the Bureau acknowledge that new evidence showing Gardner's non-compliance with Commission requirements would raise substantial questions about Gardner's rehabilitation and compliance. As Glendale states:

In the absence of new facts, the Presiding Judge would be required to reach the same conclusion because the staff's determination would be binding on him.

Indeed, in the absence of new facts raising questions about Mr. Gardner's qualifications, the only result that could be reached is the result reached by the Chief, Mass Media Bureau...Opposition pp. 5, 6-7.

But here new facts raising questions about Gardner's qualifications are not absent--they are, to the contrary, over abundant--and

inquiry into Gardner's rehabilitation and compliance is plainly warranted.

41. Likewise, the Bureau recognizes that the Commission has mandated further evidentiary inquiry into Gardner's rehabilitation and compliance where new evidence is presented that Gardner has "been involved in any significant wrongdoing since the alleged broadcast related misconduct occurred" and has failed "to take meaningful measures to prevent the future occurrence of FCC-related misconduct." MMB Comments, pp. 5-6. The Bureau also recognizes that new evidence of misconduct and lack of compliance has been presented, because it supports the addition of issues relating to misrepresentations and lack of candor in a number of low power applications, whether Glendale committed a plethora of reporting violations, and whether Glendale falsely certified the availability of its antenna site. The Bureau's opposition to the addition of such issues is, therefore, inconsistent with its recognition that evidence of additional FCC-related misconduct mandates inquiry into Gardner's rehabilitation and compliance, and its determination that serious questions concerning such misconduct have been raised. RKO General, Inc. (WAXY-FM), supra; MMB Comments, pp. 5-6.

42. The Bureau bases its position on its view that the questions about Gardner's rehabilitation and compliance will be encompassed within the "addition of other issues in this proceeding" which the Bureau supports and that the specification of separate issues "would be unnecessarily duplicative." MMB Comments, pp. 21-22. However, the issues requested are not duplicative and the importance of specifying clearly defined issues

is paramount. TBF's requested issue 1 inquires whether Glendale has established at the threshold, as required by RKO, that Gardner is rehabilitated. The lack of a "refreshed" rehabilitation showing in Gardner's application coupled with evidence of further violations clearly establish that he has not been rehabilitated. Requested Issue 2 inquires about the effect of Gardner's misrepresentations and lack of candor on Glendale's qualifications in light of the questions that exist about his rehabilitation--precisely the issue the Commission contemplated would be required when it directed Gardner to establish his rehabilitation in the first place. Requested Issue 8 inquires into the credibility of Gardner's promised compliance program in light of his subsequent misconduct and lack of candor, even in connection with the applications in which he submitted his compliance program. Requested Issue 9 inquires into the veracity of Gardner's renewed representation, in the Miami application, that the compliance program had been implemented, when it manifestly had not.

"duplicative" of the evidence which might be adduced under the issue requested. Both positions trivialize the independent importance of the very explicit and detailed promises that Gardner made to the Commission concerning his "rehabilitation" and future good conduct, particularly how he was going to carefully review each application and how he instructed his counsel to design a "compliance program," and ignore the evidence provided in this proceeding that Gardner's promises were empty and his "compliance program" a sham. Gardner's representations in his rehabilitation showing promises cannot be so easily dismissed--they were explicit, detailed, and made with the transparent purpose that the Commission rely on them. In fact, Glendale's qualifications to be a Commission licensee can be succinctly judged on how well Gardner has taken to heart the statement he made in his March 14, 1990 filing with the Commission: "I now realize the importance of being absolutely candid in applications and statements made by me." The facts reveal that Mr. Gardner's realization may yet be "imperfect." Glendale has indulged in a pattern of misconduct--of not reporting relevant facts to the Commission in connection with its Miami application, of falsely certifying its financial qualifications, and, most importantly, of making material misrepresentations in connection with the same applications in which the rehabilitation showing was submitted. In fact, when the Declarations of Mr. Gardner comprising the rehabilitation showings were filed with the Commission, four of the applications at issue were then tainted by a material misrepresentation concerning the availability and technical feasibility of the antenna sites specified.

Significantly, Gardner, in both his Opposition and in the Declaration of George Gardner which accompanied it, conspicuously refrains from any assertion that the compliance program was actually implemented. Gardner's course of conduct--the number and variety of misrepresentations and derelictions affecting all his applications--raises a "substantial and material question" concerning whether Gardner's representations were or could have been made in good faith.

44. In addition, while the evidence which might be adduced under the issue may, in some respects overlap, or be derivative of evidence relevant to other issues requested by TBF, the representations concerning Mr. Gardner's conduct and the establishment of a "compliance program" are independent and separate representations whose truth or falsity, candor or lack thereof, are clearly relevant to Glendale's qualifications to be a licensee. Moreover, if the impact of Gardner's deceit in making these representations is not a separate issue, the Commission would be precluded from making findings which could result in disqualification of Glendale, no matter how calculated and cynical the evidence showed Glendale's conduct to be. Pleasant Valley Broadcasting, Inc. 6 FCC Rcd 4163, 69 R.R.2d 848, 850 (Rev. Bd. 1991). The addition of a separate issue is compelled by the facts and is required to determine if Gardner's solemn representations concerning his "careful review" and "compliance program" turn out to be as great an illusion as the divestiture pledge he made in connection with the WAXY proceeding.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves assigning tasks to team members, setting deadlines, and monitoring progress to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves comparing the actual outcomes with the objectives and goals to determine the effectiveness of the project and identify areas for improvement.

precluded from adding an issue because the showing was submitted with Glendale's application and was, therefore, already considered and resolved in Glendale's favor by the processing staff in designating the case for hearing. According to this line of argument, when the Hearing Designation Order closes, as this one does, with the line "except as indicated by the issues specified below, the applicants are qualified," that statement constitutes a determination of the issue on its merits which the Presiding Officer, under Atlantic Broadcasting Company, 5 F.C.C.2d 717, 8 R.R.2d 991 (1966), is precluded from disturbing. This line of argument is arrant nonsense. Atlantic Broadcasting requires the Presiding Officer to respect the "reasoned analysis" of the staff when it resolves an issue in the Hearing Designation Order. A bald statement that the applicants are qualified except for the issues added is not a "reasoned analysis." A "reasoned analysis" requires, at a minimum, that the potential issue be addressed, and not only does the HDO contain no mention of the rehabilitation showing, there is not a scintilla of evidence that the Commission staff considered the issue at all. The Mass Media Bureau inferentially concedes the barrenness of this argument when it supports the addition of a financial issue against Glendale based entirely on information submitted with the application but presumptively overlooked by the Commission processing staff. In any event, had the HDO contained the reasoned analysis required, it could not possibly have considered the new evidence of Gardner's violations that were subsequently shown in TBF's Contingent Motion.

47. Accordingly, since Glendale's application lacks "an affirmative showing of rehabilitation and good character" updated past July 1990, the addition of an appropriate issue is clearly warranted.

VII. Glendale's Intentions Are Unreliable

48. TBF's Contingent Motion urged that an issue be designated to determine whether, given Raystay's recent failure to construct four LPTV stations, Glendale actually intends to construct and operate the station proposed here. Glendale's response does nothing to dispel the concerns raised by that record of non-constructions. Indeed, Glendale's admission that Raystay tried to sell the four LPTV permits (and actually did sell a fifth) only heightens the concerns.

49. Glendale claims that "it would make no sense whatsoever for Glendale to spend the substantial amount of money needed to prosecute its application if it did not intend to build its station." Opposition, p. 29. Yet Glendale does not deny that it could sell the Miami station at enormous profit right after putting it on the air, and this is exactly what Glendale may do in light of what we now know about Raystay's LPTV efforts.

50. These facts raise a substantial and material question about the bona fides of Glendale's application, for the Commission will not award a construction permit to one who intends merely "to flip" the station. Calhoun County Broadcasting Co., 57 R.R.2d 641, 646 (1985) ("construction permits are granted only to qualified applicants who have a bona fide intention to construct the

& Davis Enterprises, Inc., 54 R.R.2d 868 (1983) (Commission refuses to grant construction permit to applicant who intended to assign the permit rather than construct and operate as proposed.

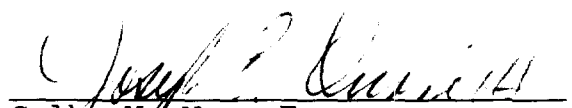
51. If a special issue is not designated to determine Glendale's intentions, then the Presiding Judge should rule that the matter may be explored under the standard comparative issue.

WHEREFORE, the foregoing premises considered, Trinity Broadcasting of Florida, Inc. respectfully urges, should the Presiding Officer not dismiss Glendale's application, that the issues previously requested in its "Contingent Motion To Enlarge Issues Against Glendale Broadcasting Company" be expeditiously granted.

Respectfully submitted,

**TRINITY BROADCASTING OF FLORIDA,
INC.**

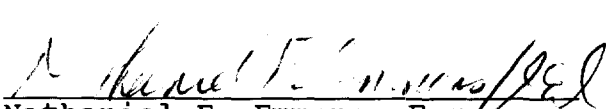
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June 22, 1993

Certificate of Service

I, Brian Claydon, a law clerk in the law offices of May & Dunne, Chartered hereby certify that I have caused to be sent, this 22nd day of June 1993, via first class U.S. mail, postage prepaid, a copy of the foregoing "REPLY TO OPPOSITION" to the following:

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